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CURRENT TOPICS.

As might have been expected, the excitement caused by the Cincinnati riot has reached the legislative chambers of the State, and impelled the legislature to enact reformatory measures whose wisdom may well be doubted, and, we are sure, sober reflection will not justify. Bills have already been passed to make men competent as jurors in cases where they have formed or expressed an opinion, and to decrease the number of peremptory challenges allowed a prisoner from twenty-three to six; and bills are pending to authorize majority verdicts, and to introduce other radical forms of procedure. There can be no question, as we have always contended that there is too much laxity in the investigation and punishment of crime, and that, therefore, there is a grave necessity for reform. But changes which affect the life and liberty of freemen should be the results of calm, deliberate consideration, demanded by men who are not flushed with excitement, and accepted by legislators who free their minds from all ideas of responsibility to a mob, determined to do naught but slow justice. We are not in favor of swift justice. Popular condemnation can not be allowed to try an accused. The popular forum can be given no greater power than it enjoys to-day, and that power should by all means be wiped out, for wherever it exists, towards that section, the finger of scorn of respectable communities is pointed. The law itself must be upheld; but the stringency of the rules of law should be relaxed. The jury system may be altered; but the system itself is one of the dearest things to a freeman's heart, and must not be torn away. The right of appeal to the supreme tribunal may be limited, so that the rulings of the trial court shall be final upon objections for informalities; but to abolish the right of appeal altogether would be to strike down one of the safeguards of man's liberty. The innate sense of justice teaches us that it is better that nine men escape than that one innocent man be condemned. That is a mere argument, but no insane amendment of the law can ever command the dictates of conscience to believe otherwise. The rules of evidence may be changed, but no legislature will compel a man to testify against himself. Let the law be changed. It needs amendment. But let no change be made out of hostility to the law itself, or, in the days of sober reflection, the people will repent of their doings and mandates. Let the legislature move slowly; let them consider every change carefully, for *every change they make is intended to impair the security of the lives of every citizen.* Loss of property can be atoned for; loss of reputation may be retrieved; but when life is gone, nothing can recall it. Therefore let there be no excitement, no speed, no impatience, no revenge, no pandering to popular applause, but honest, fearless action, dictated by minds bent only upon justice.

The tendency of the decisions during the past year has been so favorable to the extension of the jurisdiction of Federal courts, that it has called forth some deprecatory expressions on the part of those who see in it a danger to the interests of the people and gratification for corporate monopoly, united to undermine the popular welfare, and a bill has been introduced in Congress to amend the Removal Act, with a view to curtailing the jurisdiction of the Federal courts. This feeling is well warranted. That corporations are desirous of having all their causes removed to the Federal courts is a fact so well established that one would have great temerity to deny it. That this centralizing influence tends to shake confidence in the integrity, or, at least, impartiality of the incumbents of the Federal bench, is something more deplorable but, nevertheless, as true. It will require evidence more convincing than that now at our command, to satisfy us that there is any cause for alarm, for a miscarriage of justice, in the Federal courts: but it is an indisputable fact, that the corporations look with displeasure upon any incumbent of the Federal bench, whose feelings are with the people. Deplorable as it may seem, and much as we regret to say it, there is a well founded sus-

picion that men have been elevated to the supreme judicial tribunal in the land, if not at the behest of corporate interests, certainly with notice that their prejudices were naturally with those interests, and that they might be expected to care for their protection. Much as we may dislike political nominations, there is cause for despair when we witness appointments on the ormer grounds. The thing has grown. Inch by inch this centralizing influence is moving on. The Federal dockets are filling up, and the State courts are being relieved of litigation. The Federal courts sit at one place, and it is is a convenient way of exhausting one's apponent to drag him from the northwestern county of a large state down to the central part of the State, and then compel him to present his plaint to a court governed perhaps by different notions of the law, and where things are so shaped, that the suit may be ultimately carried to Washington to be there buried for a number of years.

He who can look upon these things and not feel his State pride offended lacks the elements of patriotism. It is time to call a halt. The Federal courts should be deprived of this power. The State courts and the jurisprudence of the State have ample power and justice to mete to every one his dues and be governed by no sinister motive or prejudice. The argument of foreign prejudice is ill founded, and if it exists at all, they who seek to take advantage of it, are responsible for it. A halt is in order. The claim of foreign prejudice is delusive, and there is at the bottom of the Removal Act, a combination of influences, none of which can withstand the test of honest strutiny. We contend and have always contended that the Federal courts should administer Federal laws, and that the Federal laws should be given all the recognition that was stipulated at the outset. To any further recognition we are opposed, when we see the results. We cannot believe that any one outside of those representing corporate interests, can look upon this invasion of the domain of the State judiciary with any thing but regret, and we again assert that it is time to undo what has been done.

INSANITY IN WILL CONTESTS—BURDEN OF PROOF.

The summary manner in which the Supreme Court of Iowa recently dismissed the subject of this paper, holding that the burden of proof is upon the contestants to prove insanity, and its corollary that the sanity of the testator is presumed, might create the impression that there was no conflict among the authorities, when the contrary is the fact. The question resolves itself into two parts (1) Does the law presume the testator to have been sane, or is affirmative proof of his sanity required; (2) when insanity is alleged, is the burden upon the contestants to show insanity, or are the executors obliged to satisfy the jury by a preponderance of evidence that the testator was sane?

Judge Redfield concludes that "it must be admitted upon a careful examination of all the cases that the burden of proof of insanity in the case of a will, equally with that of a deed or other contract, is upon the party alleging it, and who claims the benefit of the fact when established." [2] Greenleaf would have done a greater service to himself and left his distinguished memory unblurred, had he concluded to ignore the whole question, for we find him at one time laying down the unqualified rule that where insanity is alleged the burden of proving it is upon him who makes the allegation;[3] but later on,[4] that "in the probate of a will, as the real question is whether there is a valid will or not the executor is considered as holding the affirmative, whether the question of sanity is or is not raised," but still later,[5] that "the burden of proving imbecility or unsoundness of mind in the testator is, therefore, on the party impeaching the validity of the will for this cause." How the executor can hold the affirmative "whether the question of sanity is or is not raised," and yet throw the *onus* upon his adversary, is something beyond our powers of comprehension. Best[6] and Jarman concluded not to dwell upon the matter.

[1] 18 Cent. L. J. 80; 17 N. W. Rep. 456.
[2] 1 Redfield on Wills, 32, sec. 4.
[3] 1 Greenlf. on Ev., sec. 81.
[4] Id. sec. 77.
[5] Id. sec. 89.
[6] Jarman on Wills; Best's Evidence.

The cases which are in irreconcilable confusion may be divided into four classes, from each of which a distinct rule may be deduced. In the first class sanity is presumed, no affirmative proof thereof is required, and the *onus* is upon the contestant to disprove it. In the second class, the same presumption is indulged, but when the insanity of the testator is attacked, though the presumption remains, yet the executor must sustain the attack throughout the contest. In the third class no such presumption is recognized, but affirmative proof is required of the executor, upon whom the *onus* remains. In the fourth class, the membership of which is very limited, the last rule is qualified to this extent, that the presumption of sanity may, or may not, exist, the question to be determined by the circumstances attending the execution of the will, but that, in no event, can such presumption take the place of positive proof.

In England it was, as far back as 1759, declared by Lord Hardwicke, that "you must show the person to be of sound and disposing mind, where a will is to be established, and especially if there are infants in the case; proving it to be well executed according to the statute of frauds, is not sufficient;" that the proof of a will is attended with more solemnity than that of a deed, the former being supposed to be be made when the testator is in *extremis*, and therefore, it is necessary to prove the sanity which is presumed in the case of the latter.[7] Baron Parke later assumes "that the rules which govern" will cases "do not admit of dispute," one being "that the *onus probandi* lies in every case upon the party propounding the will, and that he must satisfy the conscience of the court that the instrument so propoundpounded is the last will of a free and capable testator."[8] But we have Lord Loughborough's authority that the rule is that "if derangement is alleged, it is clearly incumbent on the party alleging it to prove such derangement."[9] But again, we find it to be asserted, "he who alleges competency must prove it. He who relies upon a will in opposition to the title of the heir-at-law, must allege that it is the will of a person of a sound and disposing mind; he must therefore prove it." But this broad statement seems to be qualified so that competency of the testator must be assumed until it is impeached by evidence," but this assumption is admitted to be merely "an inference drawn by the jury from the absence of evidence to show that the testator did not enjoy that soundness which experience proves to be the general condition of the mind." But, as if to gain the good will of all parties, the court added, that "where a will is set up to be valid, a jury ought not to pronounce it to be so, unless they are convinced in the affirmative."[10] Notwithstanding the confusion, it is some consolation to know that the weight of authority established the rule that the burden never shifts, but that the executor bears it throughout the contest. The question has not, to our knowledge, reached the House of Lords, and we venture no prediction of the result when it reaches that body, remembering the fate of Judge Redfield upon another question.

Turning our attention to this country, we find greater confusion still. Not only have the courts of one State shown great delight in repudiating the decisions of the courts of their sister States, but no hesitation has been betrayed in modifying, explaining and overruling their own. In New York, the question has been well discussed. At an early day it was "taken for granted" that "in all cases where the act of a party is sought to be avoided on the ground of his mental disability the proof of the fact lies upon him who alleges it, and until the contrary appears, sanity is to be presumed." "Almost all mankind are possessed of at least a sufficient portion of reason to be able to manage the ordinary concerns of life. To say, therefore, that sanity is not to be presumed until the contrary is proved, is to say that sanity, or fatuity, is the natural state of the human mind."[11] Again, it is laid down that where the general sanity of the testator is not questioned, "the *onus* of proving that, at the particular time when the will was executed, he labored under any delusion, aberration or

[7] Wallis v. Hodgeson, 2 Atkyns, 55. The latter grounds are assigned in Harris v. Ingledew, 3 P. Wms. 91. See Baker v. Butt, 2 Moore, P. C. 317.

[8] Barry v. Butlin, Curteiss Ecc. 637. See Browning v. Budd, 6 Moore, P. C. 430; Parke v. Ollat, 2 Phil. 328.

[9] Attorney-General v. Paruther, 3 Bro. Ch. Cas.441.

[10] Sutton v. Sadler, 3 C. B. (N. S.) 87.

[11] Jackson v. Van Duson, 5 Johns. 144; Same v. King, 4 Cow. 207; Phelan's Case, 9 Abb. Pr. 286.

weakness of mind, rests with the contestant." [12]

In a later case, however, where an exhaustive review of the question was made, the Court of Appeals concluded (1) that "in all cases the party propounding the will is bound to prove to the satisfaction of the court, that the paper in question does declare the will of the deceased, and that the supposed testator was at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory; (2) that this burden is not shifted during the progress of the trial and is not removed by proof of the *factum* of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will; (3) that if upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question contains the last will of the deceased, it is bound to refuse it probate; (4) that the heirs of a deceased person can rest securely upon the statutes of descents, and that the rights thus secured to them can only be divested by those claiming in hostility to them by showing that the will was executed as required by law, and by a testator possessing a sound and disposing mind and memory.[13] And these rules were afterwards conceded to be "safe and reliable guides in cases" of that character.[14]

An able presentation of the question has been made in Massachusetts. It was long ago established, that the burden throughout remains upon the proponent of the will, and that he was entitled to the open and close.[15] But, in Brooks v. Barrett,[16] while this right was conceded, it was declared that the right is based upon the fact that the proponent is bound to prove the sanity of the testator, but when the attack comes from the heirs, the burden is upon them to prove the insanity. "For the presumption of law is that all men are of sound mind, and those who would defeat this presumption by a suggestion of insanity, must prove the exception to the general rule. After the testimony of the subscribing witnesses is taken the burden of proof shifts from the executor to the heir."

This case was however shortlived, it being overruled by Crowninshield v. Crowninshield,[17] in an able opinion by Thomas, J.; and not only was the ruling in the former case upon the *onus probandi*, disapproved, but serious doubt was entertained whether any presumption of sanity exists at all. "If such presumption exists," said the Judge, "no proof of soundness of mind would be necessary until those opposing the will had offerred some evidence to impeach it. The presumption of sanity would be sufficient until there was something to meet it." And he continues, "There are strong reasons why the same presumptions as to sanity should not attach to wills as to deeds and ordinary contracts. Wills are supposed to be made *in extremis*. For this reason, the execution of a will [18] and proof of it are invested with more solemnity;" and the opinion of the court is declared to be, that "the burden of proof is on the executor or other person seeking probate, to show that the testator was at the time of its execution of sound mind; that if the general presumption of sanity is to be applied to wills, it does not change the burden of proof; that the burden does not shift in the progress of the trial, the issue throughout being one and the same; and if upon the whole evidence it is left uncertain whether the testator was of sound mind or not, then it is left uncertain, whether there was a person capable of making a will, and it can not be proved."[19] And this is the law of the State to this day.[20] But the doubt of the learned judge, as to the presumption of sanity was soon removed, by the decision of the court, that such presumption exists in the absence of evidence to the contrary, but not without the protest of the learned judge who declared his adherence to his former view.[21]

In Maine, the earlier cases, hold that the proponent of the will is bound to prove the sanity of the testator, that it is not to be presumed, and leave us to infer that the *onus* re-

[12] Allen v. Public Administrator, 1 Brad. Surr. 378; Gombault v. Same, 4 Id. 244.
[13] Delafield v. Parish, 25 N. Y. 34, 35.
[14] Eau v. Snyder, 46 Barb. 232.
[15] Phelps v. Hartwell, 1 Mass. 71; Blaney v. Sargent, Id. 326; Buckminster v. Perry, 4 Id. 593.
[16] 7 Pick. 94.
[17] 2 Gray, 524.
[18] Ib. 532.
[19] Ib. 534.
[20] Baxter v. Abbott, 7 Gray, 83.
[21] Ibid.

mains upon the proponent.[22] And in a later case, the court sustained a ruling that the proponent must prove "that the testator possessed a degree of intellectual vigor necessary to make the will valid," but although "she was bound to prove sanity," the court would not concede that "she was bound to negative insanity, before and without proof, of its existence," and then forgetting what it had first declared, they quote, with approbation, Swinburne's statement of the law that "every person is presumed to be of perfect mind and memory until the contrary be proved; * * because where the contrary appeareth not the law presumeth it. It need not be proved."[23] We can draw no rule from this case as to the presumption, for the court, after this exhibition of duplicity, leaves us in the dark. We however learn from the decision, that "the burden remains with the proponent," but that "the party alleging insanity should offer evidence tending to show it before the proponent should be called upon to negative its existence." As proof of sanity, necessarily negatives the existence of insanity, we think that this rule dispenses with any proof of sanity in the first instance.

In New Hampshire the rule is, in certain terms, declared to be that the testator is presumed to have been sane, until the contrary appears, and the burden of establishing insanity is upon the contestants.[25]

In Vermont we meet with confusion. It was at first supposed that "the presumtion is in favor of the will and of the capacity of the person making it;" and that it was "therefore incumbent on the party attempting to defeat the will, to show affirmatively the existence of such disability."[26] But in Williams v. Robinson,[27] these decisions were declared not to be law, and the burden of proof was thrown upon the proponent. "No person," said Pierpont, C. J., "can so dispose of his property unless of sound mind. Hence, when the proponent presents the instrument, he must satisfy the court that the deceased belonged to that class of persons who can by law make wills." "The burden is upon him at the outset, whether anyone appears to contest the will or not. The appearance of a contestant can not change or lessen the burden." In Connecticut the proponent has the burden of proof,[28] and no presumption of sanity is recognized.[29] He must introduce affirmative evidence of capacity before probate will be granted.[30] "The statute provides that all persons of sound minds may make wills. This language in connection with the important character of the act and the solemnity required in its execution is sufficient to account for the practice of requiring proof of capacity, and considering the circumstances under which most wills are made, and the importunity likely to be practiced upon persons in their last moments, there is reason enough for the practice, whether it be well-founded or not."

So, in Michigan, the law was long ago declared to be that the burden remains with the proponent, but the court declined to decide whether there was any presumption of sanity, intimating broadly, however, that when any case might arise, the question of presumption would be determined by the facts of each case principally, whether the will was executed *in extremis* or in sound health.[31] Judge Cooley afterwards qualified this statement to the extent that some other evidence than the mere presumption of sanity (if any exists) must be offered by the pro-

[22] Gerrish v. Nason, 22 Me. 438; Cilley v. Cilley, 34 Id. 162.

[23] Swinburn on Wills, 45, pt. 2, sec. 3, p. 4.

[24] Barnes v. Barnes, 66 Me. 286, 297, 300.

[25] Pettis v. Bingham, 10 N. H. 514; Perkins v. Perkins, 39 N. H. 163.

[26] Robinson v. Hutchinson, 26 Vt. 45, per Isham, J.

[27] Dean v. Dean, 27 Id. 746; Williams v. Robinson, 42 Vt. 663; Roberts v. Welch, 46 Id. 164. "It would be quite extraordinary if a denial of a fact necessary to be established by the proponent should have the effect to relieve him from that obligation, and impose upon the party making the denial the burden of disproving it." And he adds that if there is a presumption, "it is no stronger than positive proof, and the burden must therefore still rest upon the proponent." But he denies that there is such a presumption. "From what does it arise," he asks. "Certainly not from the fact that the great majority of mankind have sufficient capacity, no more than the law will imply that all men are white because a majority are, or that all men are dishonest, because so many are." And after showing that the law requires strict proof of execution, he continues, "why then should the law presume capacity, the most important element in making a valid will and the one best calculated to protect the testator against fraud and imposition?" And he concludes in saying, "I can see no good resulting from the presumption, but room for much evil. There is no necessity for it, as proof is always accessible; then why not require the proponent to prove it."

[28] Comstock v. Hadlyme, 8 Conn. 254.

[29] Knox's Appeal, 26 Id. 22.

[30] Ibid.

[31] Beaurien v. Cicotte, 8 Mich. 9.

ponent.[32] Later, the court would not go so far as to say that no presumption exists, but held that if it did exist, that it was "very clear that it can not have the force of an independent fact to serve as a substantial makeweight against counterproof. Because, if it did, the rule of law which casts upon proponents the necessity of showing the testator's soundness of mind, would be subverted."[33]

But in New Jersey the principle "that the presumption of law is in favor of capacity and that he who insists on the contrary has the burden," is taken to "have become well settled" and "the importance of adhering to this rule which long experience has fully tested to be wise" emphasized.[34] And the same rule prevails in Pennsylvania.[35] So in Alabama,[36] where Shelford[37] is quoted to the effect that "reason being the common gift to man, raises the general presumption that every man is in a state of sanity and that insanity ought to be proved; and in favor of liberty and of that dominion which by the law of nature, men are entitled to exercise over their own persons and properties."[38] And the same view obtains in Arkansas.[39] So in Ohio.[40] So in Illinois,[41] Mississippi,[42] Virginia,[43] Kentucky,[44] and in Hawkins v. Grimes, the view opposite to that of Judge Cooley was taken, that the presumption may be used as a makeweight in the proof of sanity.[45] So the presumption is in favor of the propounder, and the burden upon the contestant in California,[46] North Carolina,[47] Indiana,[48] Iowa,[49] Louisiana,[50] Tennessee,[51] Maryland,[52] and *semble*, in Missouri,[53] in the Federal Courts.[54] And in Delaware, we are told that "reason being the common gift of man, raises the general presumption that every man is in a state of sanity until the contrary is proved; every man, therefore, of full age, has the right to dispose of his property by will, unless he can be shown to be of unsound mind."[55]

But in Texas it is said, that "in matters of probate under their law, no presumption of sanity is indulged, on the contrary in order to establish will, it must affirmatively appear that the deceased was of sound mind, when he signed the will."[56] And the Supreme Court of Georgia emphatically declares that "when one comes into a court of Justice to give the property of a deceased person a different direction from that given by the law, he takes upon himself to prove all the condition on which his rights depend," and consequently "that it is a part of the propounder's case to prove the sanity and freedom of the testator, and unless the jury be affirmatively satisfied that he was of sound mind, they should find against the will."[57]

The first rule then may be taken to be established in New Hampshire, Arkansas, Ohio, Illinois, New Jersey, Mississippi, Pennsylvania, Virginia, Kentucky, California, North Carolina, Indiana, Iowa, Louisiana, Tennessee, Maryland, Alabama and Delaware, certainly the great majority of the States where the question has arisen. The second rule

32 Taff v. Hosmer, 14 Mich. 319. The general proposition is affirmed in Kempsey v. McGinness, 21 Id. 123; Aiken v. Weckerly, 19 Id. 482.

33 McGinness v. Kempsey, 27 Mich. 374.

34 Whitenack v. Stryker, 1 Gr. Ch. 11; Sloan v. Maxwell, 2 Id. 563, 580; Den d. Trumbull v. Gibbons, 2 Zab. 155; Turner v. Hand, 3 Wall, J. 120; Turner v. Cheesman, 2 McCart. 244.

35 Landis v. Landis, 1 Gr. 248; Grabill v. Barr, 5 Pa. St. 441; Werstler v. Custer, 46 Pa. St. 502; Thompson v. Kyner, 65 Id. 378; Egbert v. Egbert, 78 Id. 326; Grubbs v. McDonald, 9 Ib. 236.

36 Saxon v. Whittaker, 30 Ala. 237; Copeland's Exr., 32 Id. 512.

37 Shelford on Lunatics, part 37.

38 Cotton v. Ulmer, 45 Ala. 396.

39 McDaniel v. Crosby, 19 Ark. 545.

40 Mears v. Mears, 15 O. St. 90.

41 Menkins v. Lighter, 18 Ill. 282.

42 Payne v. Banks, 3 Geo. 292; Mullins v. Cottrell, 41 Miss. 316.

43 Burton v. Scott, 3 Rand. 399.

44 Singleton's Will, 8 Dana, 315.

45 13 B. Monr., 258.

46 Panand v. Jones, 3 Cal. 488.

47 Mayo v. Jones, 78 N. C. 402. But it is important to notice that the statutes of North Carolina do not require the testator to be "sane" in express terms, and peculiar stress is laid upon this omission by the court in its decision.

48 Rush v. Magee, 36 Ind. 69; Turner v. Cook, Id. 129. See Moore v. Allen, 5 Id. 521.

49 In the matter of the will of Henry Coffman, 12 Iowa, 491.

50 Chandler v. Barrett, 21 La. Ann. 58.

51 Ford v. Ford, 7 Humph. 92; Puryear v. Reese, 6 Cold. 21; Fear v. Williams, 7 Baxt. 250; Bartee v. Thompson, 8 Id. 508.

52 Higgins v. Carlton, 28 Md. 141, 142; Tyson v. Tyson, 37 Id. 584; Taylor v. Cresswell, 45 Id. 430.

53 See Harris v. Hayes, 53 Mo. 93.

54 Stevens v. Vansien, 4 Wash. C. C. 269; Hall v. Unger, 4 Sawyer, 672, per Field, J.

55 Duffield v. Morris, 2 Harr. 379.

56 Beazley v. Denson, 40 Tex. 425.

57 Evans v. Arnold, 52 Ga. 169, 180, 182.

stands defended by Massachusetts alone. The third rule finds support in Vermont, Connecticut, New York and Texas. The fourth rule was born in Michigan, and in no other state has it been embraced.

It may seem out of place for one in the face of such an over whelming weight of authority in favor of the first rule, to express an opinion that it is unsound in principle; yet it is too true that it is contrary to the spirit, with which the rights of heirs have always been dealt. Until the statute of wills was enacted the right of disinherison did not exist. The moment the owner of land united the last breath of life, the law summon the heir and place upon him the crown of ownership. It required no deed, no formal act, to transfer the title. The livery of seizin which made this change possible, existed only in the imagination. The sanity or insanity of the deceased, the obedience or rebelliousness of the heirs, made no impression upon the commands of the law.

The statute made a change in this regard. It provided that all persons of a sound and disposing mind might devise their property to whomsoever they please. Bysuch a will the title of the heir vested by the law, is divested. Only by a strict compliance with the formalities required by the various statutes, can such a title in contradiction of the common law be obtained. All statutes derogatory to the common law are strictly construed. No effect can be given them except such as is warranted by a liberal interpretation of their meaning, not even though they be enacted in recognition of the "liberty of a freeman to select those who should enjoy the earnings of his life's labor." Just as surely as strict proof of a written will is required, so should the conscience of the court be satisfied that such written will is the outcome of the serious deliberation of a sane and disposing mind. The statute allows no other class to make wills; those claiming the benefits of the statute must show that they come within the class completed by its framers. But Judge Redfield says that "those who claim the benefits of the insanity of the testator should prove it." By no means. They do not claim the benefits of the insanity. They claim the estate given them by the common law. They deny that which the statute prescribes—that the will proceeded from a sane mind. They deny that the claimants are entitled to the benefits of the statute. They claim nothing. They are already the owners of the testator's property. Until the will is proved, that title remains. The world recognizes no other. Those claiming under the will seek to divest them of that title, and the heirs deny their right. They assert nothing in the affirmative. They make a negative defense; and the law never required a negative to be proved.

Lonely as he may seem, one who has veneration for the law, for its reason and abstract justice, will prefer to stand by Judges Cooley and Thomas, the courts of New York, Vermont and Texas, upon the doctrine of strict construction. But it is said that if a testator makes a note and a will upon his death bed, he would be presumed to be sane for one purpose and no such presumption would be indulged in for the other. This is true, but if a statute were enacted, providing that no note should be valid, unless the maker be of sound mind, the same proof would be required. It is possible that courts ere long may retrace their steps and stand upon principle.

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LIABILITY OF SOLICITOR FOR PARTNER'S MISAPPROPRIATION OF SECURITIES.

If solicitors needed any further inducement to precaution when entering into partnership, it would certainly be supplied by the consideration of the various cases in which one member of a professional firm has been held responsible for the wrong doings of his colleague. The law, indeed, on this subject is now well settled.[1] But in Cleather v. Twisden,[2] Denman, J., appears to have gone even further than the recent decision of Lord Justice James in Lord Dundonald's Case. "That

[1] See Blair v. Bromley, 2 Ph. 354, 5 Hare, 542; Harman v. Johnson, 2 E. & B. 61; Plumer v. Gregory, L. R. 18 Eq. 621; Sims v. Brutton, 5 Ex. 802; Coomer v. Bromley, 5 De G. & Sm. 532; s. c., 20 L. T. (O. S.) 21; s. c., 1 Lindley on Part. 326; Elkington v. Mackreth, L. R. 2 Eq. 570; St. Aubyn v. Smart, L. R. 5 Eq. 183; s. c., 3 Ch. 646; Cooper v. Pritchard, 48 L. T. (N. S.) 849; Lord Dundonald v. Masterman, L. R. 7 Eq. 504.

[2] Reported in the *Law Times* of the 19th ult.

case," he observed, "seems to me to come to this, that if the business was business which imposed upon the firm the necessity, and in which the firm had undertaken the duty, of dealing with the property, and of assisting the parties to manage the property, then, if in the management of that property, and in the distribution of funds, securities get into the possession of any members of the firm who had undertaken that duty under such circumstances that the firm must be considered as joint undertakers of that duty, and he fraudulently misappropriates the property, he makes his partners responsible." There a firm of solicitors were held liable for the misappropriation by a partner of part of the proceeds of bills of exchange, which he had been commissioned by the plaintiff to receive—a work charged for by the firm, who "held him out to the world as a person for whom they were responsible." But in Cleather's Case it is not merely for the application of the proceeds realized, but for the safe custody of the securities, that a responsibility has been recognized, under the circumstances appearing. In Harman v. Johnson,[3] indeed, it was decided that it is not *prima facie* the business of a solicitor to take care of securities for a client; and in Cooper v. Pritchard,[4] it was shown that the solicitors were acting as money scriveners. However, said Denman, J.: "It can not be treated as a matter of absolute certainty that, in any particular case in which securities have been trusted to a partner, that may not be the 'firm's business;' because, although it is not *prima facie* the duty of a solicitor to act as a money scrivener, and to receive money, or to act as a warehouseman or a banker taking charge of securities, there is nothing in the law laying it down that a solicitor may not do such business as that, and there is nothing to make it criminal, or wrong, or negligent for a solicitor to do it. If, therefore, it turns out that a solicitor has so done it as to make it firm business by reason of the mode in which he has dealt with it in the books of the firm, and that the firm have such notice of it as reasonable and prudent people would get from a proper examination of their own books, there is nothing to show that it may not be firm business. Even though a partner might say, I do not know anything about this transaction, it would be a question of fact, looking at his dealings with his partner, and at the dealings of the partner with the persons who trusted the partner."

Now, in Cleather v. Twisden[5] appeared that the plaintiffs, trustees of a will, deposited with Parker, a partner in the firm of solicitors acting for them in the administration of their trust estate, certain bonds payable to bearer, part of their testator's estate. Some of the bonds were realized, and their proceeds accounted for, Parker retained the others for safe custody. The other partners had no acknowledge of this, but letters referring to the bonds were charged for in the firm's bill of costs, and copied in the firm's letter-book. Parker, also, on some, occasions, paid the interest received on the bonds by the firm's cheques, and those payments were entered in the firm's ledger. Eventually Parker absconded, and it was then found that he had sold some of the bonds and appropriated the proceeds to his own use. It being sought to hold the other member of the firm responsible accordingly, he sought to escape on the grounds that what Parker did with the bonds was neither within the scope of the partnership nor adopted afterwards—the bonds were merely deposited for safe custody, there was nothing to be done with them, and all the solicitors work was at an end, while the letters (speaking of the bonds as in Parker's custody, not the firm's) charged for would have equally charged if they contained no mention of the bonds, and the payment of interest showed no more than that the coupons had been sent to Parker. "So far as the case depends upon actual knowledge on the part of Mr. Twisden" said the learned judge, "I think he is free from any imputation of such knowledge, and that everything that was done wrong by Charles Lewis Parker in point of fact went on without any knowledge on Mr. Twisden's part, nor was there any knowledge on his part of the actual custody of these bonds. That being so, the case becomes a very important and difficult one." He came to the conclusion that the bonds had been entrusted to Parker as a member of the firm; that their custody was firm business; and

Ubi supra.
Ubi supra.

[5] 49 L. T. (N. S.) 633.

that the defendant had, as member of the firm, notice that Parker had undertaken the custody of the bonds as firm's business. And this being so, he declared "it is impossible to escape from the conclusion, although I come reluctantly to such a conclusion, that this is a case in which, according to the authorities, and especially according to the case of Dundonald v. Masterman, the defendant is responsible, innocent though he is of any wrong, perfectly innocent of any intention to do wrong, and in fact actually ignorant of the particular acts in respect of which Parker has been allowed to bind his firm, and certainly of the wrongful acts in respect of which Parker has behaved so abominably ill."

Accordingly the defendant was decreed for the entire amount of the loss sustained. In Elkington v. Mackreth,[6] indeed, which was cited, it was held that such liability was joint and not several; but, in Plumer v. Gregory,[7] which was not cited, that solitary and unconsidered decision has since been expressly dissented from. So that, hard law though it be, the innocent partner must make good all sums and damages which the firm, while he is a partner therein, becomes liable for under such circumstances.—*Irish Law Times.*

[6] *Ubi supra.*
Ubi supra.

NEGOTIABLE PAPER—ACCOMMODATION INDORSER—DIVERSION OF PAPER FROM ORIGINAL PURPOSE.

ARNOLD v. CAMPBELL.

Manitoba High Court of Justice, February 4, 1884.

One who indorses negotiable paper for the accommodation of the drawer, is liable to a *bona fide* purchaser for value thereof, although the drawer has diverted it from the original purpose.

J. B. McArthur for plaintiff; *G. Patterson* for defendant.

DUBUC, J., delivered the opinion of the court:

This in an action against the indorser of a check.

One Henderson, from Nelsonville, met in Winnipeg the defendant Caldwell, and obtained his indorsement on a check for $1,000. The check was drawn on Sutton, Wayley & Lafferty, of Nelsonville, and the indorsement of the defendant was required for the purpose of cashing it at the Merchants Bank in Winnipeg. Henderson owed the defendant $500. The understanding was that out of the $1,000, the defendant would be paid his $500 and the rest would go to Henderson. The defendant went with Henderson to the Merchants Bank, and after the check had been made and indorsed, Henderson went into the manager's office to get his consent for cashing the check. When Henderson returned from the manager's room, he said to the defendant, "they will send it forward for collection;" they then parted. But instead of the check having remained in the manager's office to be sent to Nelsonville for collection, Henderson had kept it. He on the same day went to the plaintiffs, who are wholesale grocers in this city, purchased goods to the amount of $601.35, gave the check in payment, and received, in cash, the balance, $398.65. The plaintiffs sent the check to Nelsonville and it was dishonored and protested. They afterwards brought this action. The case was tried at the last assizes, and resulted in a verdict for the plaintiffs.

The principal ground raised on the argument was, that the general practice as to checks, was to indorse them only for the purpose of obtaining the money, and not to make the indorser liable on it. This is true enough, but here it was not an ordinary check drawn on a local bank, where the drawer had funds in the bank. In this case the check was drawn on funds, supposed to be in Nelsonville to the credit of the drawer; and as the check was intended to be cashed by a local bank, where the drawer had no funds, the defendant's indorsement was obtained as security to induce the bank, on such security, to advance the funds, and secure the bank in case there were no funds to meet it in the bank on which the check was drawn. This shows that the indorser wrote his name on the back of the check for the purpose of becoming surety, and for no other purpose. The case of Keene v. Beard, 8 C. B. N. S. 372, is exactly in point. The argument, as in this case, was that a check is not to be classed with bills of exchange, so far as to be capable of creating a liability in an endorser, to the person who may be the holder or bearer of the instrument. To this, EARLE, J., said: "I may add that I do no injustice to the able argument of Mr. Grant, the counsel, when I observe that it would have been deserving of more attention, if it had been addressed to the court a hundred years ago." Daniel on Negotiable Instruments, s. 1652, says that whenever a check is negotiable, it is undoubtedly subject to the same principles which govern ordinary bills of exchange, in respect to the rights of the holder, and may be transferred by indorsement.

In Cross v. Currie, 5 Ont. App. R. 37, MOSS, C. J. A. quoted the doctrine laid down in an American case by BLACK, C. J., who says: "he who chooses to put himself in front of a negotiable in-

strument, for the benefit of his friend, must abide the consequences, and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way."

The other ground taken by defendant's counsel is, that the plaintiffs were guilty of contributory negligence in receiving such check, and not asking the defendant, when they saw him the same day or the day after, if he had indorsed the check for the purpose of becoming surety, as it is not a usual thing to have an indorser to a check. There might be some force in the argument, without saying that it would be conclusive, if the check had been drawn on a local bank, where the check would have had only to be presented to get the money. But as this check was drawn on a certain bank at Nelsonville, the true and natural inference for the plaintiffs to draw was, that the name of defendant was put there to render the instrument more reliable and better insure its payment. When it is a question for the jury to determine, whether the indorsee of a bill acted in good faith in taking it, gross negligence in taking the bill may be evidence of bad faith, but it is not equivalent to it. Goodman v. Harvey, 4 Add. & E. 870. But here there is no evidence of bad faith, nor even of gross negligence. The evidence shows conclusively that the plaintiffs took the check in good faith, believing that the defendant had put his name on it as an ordinary indorser, with all liability to be derived from an ordinary indorsement, and had no reason to view it otherwise.

I think that the verdict should stand, and the rule be dismissed with costs.

NOTE.—The doctrine of the principal case is supported by Stoddard v. Kimball, 6 Cush. 469; Bigelow's L. C., 453; which holds that the burden lies upon the defendant to show knowledge of the misapplication. See Schepp v. Carpenter, 49 Barb. 542; Dunn v. Crook, 1 Edm. Sel. Cas. 95. While the doctrine laid down in the principal case is undoubtedly correct, the plaintiff being a *bona fide* holder, it is equally true that one who purchases accommodation paper, with knowledge that the terms and conditions on which the accommodation was given have been violated, is not a *bona fide* holder as against the party who lent his name for accommodation. Small v. Smith, 1 Denio, 583; Bigelow's L. C. 449; Chicopee Bank v. Chapin, 8 Met. 40; Wardell v. Howell, 9 Wend. 170; Brown v. Taber, 5 Wend. 566; Key v. Flint, 8 Taunt. 21; Evans v. Kymer, 7 Barn. & Ad. 528. In fact, evidence of a fraudulent diversion throws upon the plaintiff the burden of showing that he acquired it for value, before maturity and without notice. See Duncan v. Gilbert, 5 Dutch. 521; Fulton Bank v. Phoenix Bank, 1 Hall, 562; Catlin v. Hansen, 1 Duer, 309; Munroe v. Cooper, 5 Pick. 412; Bailey v. Bidwell, 13 M. & W. 73; Smith v. Braine, 16 Q. B. 244.

As to what is a diversion, it is sometimes difficult to decide. There can be no doubt that, if one gives his indorsement for example, for the purpose of enabling the maker to renew a note and he appropriates it to some other purpose, that such diversion is a fraudulent diversion, and the indorser is not bound. Mohawk Bank v. Carey, 1 Hill, 513. But if the indorsement was given to enable him to raise money, and the maker uses it to pay a debt, there is no diversion. Fetters v. Muncie Bank, 34 Ind. 251. Nor does it make any difference that the maker discounted the paper at a different bank from that which was designated. See Powell v. Waters, 17 Johns. 177; Bank of Chenango v. Hyde, 4 Cow. 567; Bank v. Buck, 5 Wend. 66. The test seems to be whether the indorser was interested in the particular use of his name. If not, then no diversion took place. Purchase v. Mathson, 6 Duer, 87; De Zang v. Fyfe, 1 Bosw. 3 5. And if the paper has accomplished substantially the purpose contemplated by the accommodation, the indorser can not complain. Wardell v. Howell, 9 Wend. 170; Grandin v. LeRoy, 2 Paige, 509. But if the accommodating party has been injured by the misappropriation of his credit, he is released. Uther v. Rich, 10 A. & E. 784; Crook v. Jodis, 5 B. & Ad. 909. [ED. CENT. L. J.]

INSURANCE — FIRE — ASSENT TO TRANSFER NO WAIVER OF FORFEITURE.

INS. CO. v. GARLAND.

Supreme Court of Illinois, January 23, 1884.

1. The written assent of a fire insurance company to a transfer of a policy, does not operate as a waiver of a prior forfeiture of the policy by a breach of one of its conditions, although the agents of the company were fully aware of the breach at the time.

2. The assent to a transfer of the policy is a mere assent to the substitution of the assignee to the rights of the assignor, and in no wise increases them. So if the assignor had no rights in the policy by reason of a forfeiture at the time of the assignment, the assent to the transfer revived nothing and gave no rights to the assignee.

Miller, Lewis & Bergen, for appellant; *J. Blackburn Jones*, for appellee.

Appeal from the Appellate Court for the First District; originally appealed from the Circuit Court of Cook County.

MULKEY, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court, affirming a decree of the circuit court of Cook county, in favor of Helen L. Garland, the appellee, and against the Insurance Company of North America, the appellant, for the sum of $3,000, the amount of a loss by fire, under a policy of insurance issued by the company to Maria G. McConnell on her dwelling house, on the 23d day of November, 1876, and by her assigned, with the consent of the company to appellee, less the sum of $1,746, then held by the company.

After the issuing of the policy, and but a few days before the 23d January, 1878, Mrs. McConnell, the assured, sold and conveyed the premises to Mrs. Garland, the appellee, and thereupon moved out, leaving them vacant and unoccupied, in which condition they so remained until the time of their destruction by fire, on the 25th of September, 1879, being a period of some twenty

months. The policy, among others, contained this provision: "and if the assured shall allow the building herein insured to become vacant or unoccupied, and so remain, * * * unless the consent of the company be indorsed hereon, this policy shall become void." On the 23d of January, 1878, and but a short time after the sale and transfer of the property to appellee, her husband, John C. Garland, called at the company's office for the purpose of obtaining the company's assent to the transfer of the policy, which, after some little delay, by reason of the policy not being present, was indorsed thereon in these words:

"The property hereby insured having been purchased by Helen L. Garland, the Insurance Company of North America consents that the interest of Maria G. McConnell in the within policy may be assigned to said purchaser, subject, nevertheless, to all the terms and conditions therein mentioned and referred to."

C. H. Case, Agent."

Garland's account of what occurred at the company's office is as follows: "after the purchase of the property from McConnell, and after the McConnells had moved out of the house, I called at the office of Mr. Case, agent of the company, whose name is signed to the policy, at No. 120 LaSalle Street, to have the insurance transferred from Mrs. McConnell to Mrs. Garland, and the clerk at the desk said that I would be obliged to bring the policy before the insurance could be transferred on their books; I remarked to the clerk that it was late in the afternoon, and I had just got knowledge that the house was vacant, and desired to have the transfer made. The clerk remarked that they could put it on their book—put the transfer on their books—but it would not be legal without I had the policy with Mrs. McConnell's signature attached, and if the house was vacant I had better attend to that part of the business, because it would not amount to anything if the house was destroyed, they would not be liable for any loss. I then went out to find McConnell, and found him; got his wife's signature to the assignment on the back of the policy; it was signed by Mr McConnell, who said he was his wife's agent; I then took the policy back to Mr. Case's office, and they wrote on it their transfer. The policy was then taken back in where Mr. Case was sitting, and signed by him, brought and handed to me." In answer to the question, "now state again precisely what you said, if anything, with reference to the property being vacant"? He further said: "I told this clerk that I wanted the transfer put on the books that day, because the property was vacant, and it had just come to my knowledge that the McConnells had moved out of it, and moved into the city."

Upon this state of facts it is claimed by appellee that the company having assented to the transfer of the policy in the manner stated, with notice that the insured premises were at the time of such transfer, vacant and unoccupied, was in law a waiver of the condition which declares the policy void upon the happening of such contingency, and so the appellate court held. We do not think the evidence, or a proper construction, of that clause of the policy warrants the conclusion reached. We see nothing in Garland's statement of what occurred at the company's office that would justify the inference that the company intended a waiver of that condition in the policy. There was certainly nothing said by any one present to warrant that conclusion, so that if the proposition can be maintained at all, it must be solely on the ground that the consent of the company having notice of the fact, the property was at the time unoccupied, is of itself, in law, a waiver of the condition. We are aware of no authority sustaining this view, and certainly none has been cited going that length. We do not understand that a policy having a condition in it like the one under consideration becomes absolutely void by reason of the premises becoming vacant or unoccupied. Nor do we understand that in case of a breach of the condition of the policy in this respect, the company is bound, at its peril, upon notice of such breach, to declare the policy forfeited for that reason, even conceding it has the power to do so, of which it is unnecessary now to express any opinion. And it is well settled if the company should not exercise this power while the assured is in default, and the premises should again become occupied, its right to do so would cease, and its liability on the policy would again attach. Schmidt v. Peoria Marine & Fire Ins. Co., 41 Ill. 295; Insurance Co. of North America v. McDowell, 50 Id. 120; Westchester Fire Ins. Co. v. Foster, 90 Id. 121.

Now, the object of the company in assenting to the transfer of the interest of the assured in the policy to the purchaser was clearly nothing more than to place the latter in the same position, with respect to all rights and liabilities under it, that the assured herself occupied before such transfer. Suppose Mrs. McConnell had simply vacated the property without selling it or assigning the policy, and it had remained vacant until the loss by fire in the same way it did, and this action had been brought by her instead of Mrs. Garland, and the company had invoked the breach of this condition in the policy as a defense, would it have been any answer to have replied the company knew the premises were vacant and unoccupied, and had declared no forfeiture of the policy? Surely not. And yet, on principle, we can see no difference in this case and and the one supposed, if, as we have already seen, the transfer of the policy with the company's consent is a mere substitution of appellee as a party to the policy for Mrs. McConnell. Upon such change of parties, her relation to the policy, the company, and the subject matter of the contract, became precisely the same as that of Mrs. McConnell before the substitution. It was, in effect, reissuing the policy to another party upon the same terms and conditions it had been issued before. Suppose this had been an original policy, issued to appellee in the first instance,

under the same circumstances, how would the case stand? To say the delivery of the policy under such circumstances would be a waiver of the condition altogether, would be to not only disregard the manifest intention of the contracting parties, but would be clearly doing violence to an express provision of the contract itself. We have no doubt in such case the condition would remain in full force to the same extent as other provisions in the contract, and that, in order to secure the benefits of the policy, the assured would be bound to see the premises did not "remain" vacant or unoccupied. In such a case we have no doubt the company would have a clear right to insist on the performance of the condition, and until that was done, its liability under the policy would not attach. On the other hand, whenever the terms of the policy in this respect were complied with, the company's liability would at once begin.

The case in hand does not, in our opinion, differ in principle from the one supposed. The precise language of the policy affecting this question should be particularly noted. The condition is not that the policy shall become null and void if the assured shall allow the building to become vacant or unoccupied. That is not sufficient. By the very terms of the policy the assured must go a step further. She must not only allow the building to become vacant or unoccupied, but in the language of the policy, she must also allow it to "remain so." It is clear that under a provision of this kind, if the premises were to be suddenly vacated the assured would be bound to procure without delay another tenant or occupant, for until that was done, his or her rights under the policy would be suspended, though the policy for that reason would not become void. On the contrary, as soon as the premises were re-occupied, the company's liability would again attach. It may be, for any unreasonable delay by the assured in re-occupying the property, the company would have the right to declare the policy forfeited altogether, but it is not bound to do so, in order to avail itself of this condition. In the present case there was a wanton disregard, of the condition in question altogether, and we think justice to the company demands that its rights under the policy should not be sacrificed by a lax or latitudinous construction, which would do violence to the very terms of the company's consent to transfer. By those terms it agreed that Mrs. McConnell's interest in the policy might be assigned to appellee "subject nevertheless, to all the terms and conditions therein mentioned and referred to." And yet we are asked to hold, in the face of this express stipulation to the contrary, that the company thereby waived this condition in the policy. We can not give our assent to any such construction.

So far as this case may be supposed to depend upon whether the company had notice of the fact, the premises were vacant and unoccupied at the time of the transfer, the evidence is by no means satisfactory or conclusive, yet in the view we take of the question it is not important to discuss the evidence relating to it. Conceding it to be sufficiently established, it distinctly appears, as we understand the testimony, the company, at the very time of receiving such notice, informed the appellee's husband, who was then acting as her agent, that the company would not be liable for any loss, so long as the premises remained vacant and unoccupied. Garland himself swears he was informed, at the time of the transfer, that if the house was vacant he "had better attend to that part of the business, because it would not amount to anything if the house was destroyed; they would not be liable for any loss."

It is claimed, however, the expression, "that part of the business," has reference to the transfer of the policy. But that would certainly, in the connection in which it occurs, be a very forced construction. We think the plain, common sense of the thing requires this expression to be referred to the vacancy of the premises and not the assignment of the policy. There was no occasion to admonish Garland to quicken his steps in getting the policy assigned. He was already there in the company's office for that purpose, and doing all that one reasonably could do to accomplish that object. But not so with respect to the property being occupied. That was liable to be overlooked, and sometime would necessarily be required in procuring an occupant, hence the admoni ion.

The judgment of the appellate court is reversed, and the cause remanded, with directions to reverse the decree of the circuit court, and remand the cause to that court for further proceedings in conformity with the views here expressed.

Judgment reversed. CRAIG, J., dissenting.

NOTE.—In Fogg v. Middlesex Mutual Fire Ins. Co., 10 Cush. 337, the effect of an assent to an assignment by an insurance company is stated by the court in the following language: "As a policy of insurance is not a negotiable instrument, it can not be legally transferred so as to enable the assignee to maintain a suit in his own name without the assent of the other party. But in general, at the common law, where one party assigns all his right and interest in the contract, and the assignee gives notice to the other party to the contract, and he agrees to it, this constitutes a new contract between one of the original parties and the assignee of the other, the terms of which are regulated and fixed by those of the original contract."

In Wilson v. Hill, 3 Met. 66, a like question arose, and the court said: "If the assured has wholly parted with his interest before they (the buildings insured) are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured, and if he has sustained no damage the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium

paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee."

"If the doctrine of these cases is sound, which I believe it to be," said Craig, J., in dissenting from the judgment in the principal case, "the written assent of the insurance company to the assignment of the policy created a new contract of insurance between the company and the assignee of the policy, Helen L. Garland. In legal effect the contract of insurance was the same as if Mrs. Garland had surrendered the old policy, and the company had issued to her, and in her name, a new one for the unexpired term the old policy had to run. If I am correct in this view, the only remaining question to be determined is, whether an insurance company which issues a policy on vacant property, knowing the fact that the property is vacant, can, in case of loss, defeat a recovery on the policy on the ground that the policy contains a provision that it shall be void in case the property becomes vacant during the term for which the property is insured."

A similar question arose on a policy of insurance in Commercial Ins. Co. v. Spankneble, 52 Ill. 60, and in that case it is said: "As to the objection that the premises were unoccupied when the fire occurred, it is a sufficient answer to say that the brewery was in the same condition when the fire occurred that it was when the policy was issued, and the agent of the company was informed of its condition when he issued the policy. The company took the premium knowing the condition of the premises, and their condition being the same when destroyed by the fire, they should not be permitted to escape liability on that ground. The premises were no more vacant or unoccupied at the time of the fire than when the insurance was effected." See, also, Williamsburg City Fire Ins. Co. v. Cary, 83 Ill. 454, where a similar doctrine is announced.

In Georgia Home Ins. Co. v. Kinnet, Admx. 28 Gratt. 88, the policy upon which the action was brought contained a clause that it should be vitiated if the premises became vacant, and the court, in deciding the question, held: "If, at the time the agent of the company received the premium of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the defendant to defeat the plaintiff's recovery." In Williams v. Niagara Fire Ins. Co., 50 Iowa, 561, the policy contained a similar condition, and it is there said: "The company, with full knowledge that the house was unoccupied, and would be for a time, issues the policy and receives the premium, and then, after a loss occurs, insists that it is not bound, and the policy never had a legal existence, because said house was vacant. Having issued the policy, taken the premium, and thereby induced the plaintiff to believe she was insured, the defendant is estopped from alleging or proving the policy never had a legal existence. By issuing the policy the defendant waived the conditions as to the occupation of the building." In Aurora Fire Ins. Co. v. Kranich, 36 Mich, 289, it was held that a condition similar to the one under consideration had no application to a case where buildings insured were vacant at the time the policy issued. The Supreme Court of Maine, in North Berwick County v. New England Fire and Marine Ins. Co. 53 Maine, 336, hold that a renewal of a policy, with knowledge of the existence of facts which would authorize the insurer to declare a forfeiture, would be regarded a waiver.

But it is unnecessary to multiply authorities on the question, as we regard it well settled by authority that the insurer can not invoke the aid of a proviso like the one in question to defeat a recovery, where the policy was issued with knowledge at the time that the property was vacant. When the insurance company was notfied by Garland that the house was vacant, if it did not desire or intend to be bound as an insurer of vacant property it had the right, and good faith required, that it should refuse to consent to the assignment, and thus the contract of insurance might have terminated: but it did not pursue this course, but chose to consent to the assignment of the policy, and thus entered into a new contract of insurance with the assignee. Having done this with knowledge that the property was vacant, justice and fair dealing will not now permit the company to escape liability by claiming that the contract made by it was, at the time, worthless and void."

MASTER AND SERVANT—LIABILITY OF FORMER FOR NEGLIGENCE OF LATTER.

HEENRICH v. PULLMAN, ETC. CO.

United States District Court, for Oregon, February, 1884.

1. A master is liable for the act of his servant when done within the scope or general course of his employment, although done contrary to the master's orders.

2. A car company is responsible to a passenger injured by the negligence of its porter in letting a pistol carried by him fall upon the floor of the car, although he was carrying the pistol for a passenger, and he was expressly forbidden to carry any baggage for passengers.

Julius Moreland, for plaintiff; *Charles B. Bellinger*, for defendant.

DEADY, J., delivered the opinion of the court:

This action is brought by the plaintiff, a citizen of Minnesota, against the defendant, a corporation formed under the laws of Illinois, to recover $25,000 damages for an injury to her person, received while traveling as a passenger on a Pullman palace car, attached to a train on the Northern Pacific Railway running from St. Paul to Portland, and caused, as alleged, by the negligent handling of a pistol by the porter in charge of said car while "in the discharge of his duty as such porter," and "while attending to the defendant's business," whereby the same fell on the car floor and was discharged, the ball entering the thigh of the plaintiff and inflicting a dangerous wound therein.

The answer of the defendant controverts the allegation of the plaintiff that the porter "was in the discharge of his duty" when he let the pistol fall; and also contains a plea in bar of the action —that the pistol mentioned in the complaint was the property of a passenger on said train, that

said porter received it from the owner and was carrying it through the car at the request of said owner, and not otherwise, at the time of the discharge and wounding in the complaint mentioned; and that it is one of the defendant's rules and directions to all its car porters that they are not permitted to receive any package, baggage or article of luggage from passengers or to become custodians thereof, which rule and order was at the time of the taking and carrying of said pistol by said porter, well known to him; and that said porter in so receiving and carrying said pistol was acting in violation of the defendant's orders.

To this new matter the plaintiff demurs, for that it does not constitute a defense to the action.

A corporation is liable to the same extent as a natural person for an injury caused by its servant in the course of his employment. Moore v. Fitchburg R. Co., 4 Gray, 465; Thayer v. Boston, 19 Pick. 511.

In Story on Agency (sec. 452), it is laid down that a principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions, although the principal did not authorize or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, *respondeat superior*; and it is founded on public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency."

In Ramsden v. Boston & Albany R. Co., 104 Mass. 117, it was held, that the corporation was liable to an action for an assault and battery, for the act of its conductor in wrongfully and unlawfully attempting to seize the parasol of a passenger for her fare. In delivering the opinion of the court, Mr. Justice Gray said: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent, or even if it is contrary to an express order of the master."

The Philadelphia, etc. R. Co. v. Derby, 14 How. 294, a servant of the corporation ran an engine on its track contrary to its express order, and thereby caused a collision in which the defendant was injured; and it was held that the corporation was liable for the injury.

In delivering the opinion of the court, Mr. Justice Grier said: "The rule of *respondeat superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment."

The authorities to this point might be multiplied indefinitely; but these are sufficient.

Tried by them, this defense is clearly bad. It is not alleged that the corporation commanded the porter to do the act which caused the injury to the plaintiff, and therefore if it was not done in the course of his employment it is not liable therefor. But if the act was done in the course of his employment, the corporation is liable to the plaintiff for the injury caused thereby, notwithstanding the order to the porter. The case, so far as appears, must turn on the issue made by the denial of the allegation that the porter was in the discharge of his duty or the course of his employment, at the time he let the pistol fall. And whether he was acting contrary to his employers' orders or not, is altogether immaterial.

In Wharton on Negligence (sec. 157) in discussing this subject the learned author says "that he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts. Servants are in this sense machinery, and for the defects of his servants within the scope of their employment, the master is as much liable as for the defects of his machines."

And Cooley on Torts (539) says—"It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed."

On page 540 the learned author gives an apt illustration of the rule. A farm servant burned over the fallow when the wind was from the west, and thereby destroyed the adjoining premises on the east, although he had been directed on that very account, not to set out the fire unless the wind was in the west, and the master was responsible.

The cases cited by counsel are not in conflict with this conclusion. They are Wharton on Negligence, sec. 168, Tuller v. Voght, 13 Ill. 285, Oxford v. Peter, 38 Ill., 435, Foster v. The Essex Bank, 17 Mass., 508, and Mali v. Lord, 39 N. Y., 381. They are only to the effect, as is said in Oxford v. Peter, that the master is not liable "for the willful or malicious acts of his servant, unless it is in furtherance of the business of the master."

The contention in these cases was not as to the rule of law, but the application of it—whether the act complained of was done in the furtherance of the business of the master, or rather in the course of the servant's employment.

Sometimes, this is a very nice question and difficult to determine; but the rule of law is I think undisputed—that where the servant is acting in the course of or within the scope of his employment, the master is liable for his acts of commission or omission as if they were his own; and this, notwithstanding the servant may have acted contrary to his master's orders.

Whether the fact complained of in this case was within the scope of the porter's employment, on that occasion, will be ascertained from the evidence on the trial of the issue elsewhere made in the case.

The demurrer is sustained.

NOTE.—A very nice case upon the law relating to the liability of a master for the acts of his servant was recently decided by the Minnesota Supreme Court, Marrier v. St. Paul, Minneapolis & Manitoba Railway Co., 29 Alb. L. J. 255.

Section men employed by defendant railroad company in charge of a section foreman at the time of dinner, built a fire upon the railroad right of way to warm their coffee, the foreman assisting in doing so. The fire was not extinguished by them, and spread to plaintiff's land and destroyed his hay. The company did not board the workmen. *Held*, that the company was not liable for the loss of plaintiff's hay.

Said the court: "The doctrine of the liability of the master for the wrongful acts of his servants is predicated upon the maxims, "*respondeat superior*" and "*qui facit per alium facit per se.*" In fact, it rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. Smith Mast. and Serv. 151. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as he servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thomp. Neg. 885, 886; Sherm. & R. Neg., secs. 62, 63; Cooley, Torts, 538; Little Miama R. Co. v. Wetmore, 20 Ohio St. 110; Storey v. Ashton, L. R., 4 Q. B. 476; Mitchell v. Crassweller, 13 Com. B. 236; McClenaghan v. Brock, 5 Rich. Law. 17.

It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the act of these section men in building a fire to warm their own dinner, was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they were when eating their dinner, and were for the time being their own masters as much as when they ate their breakfast that morning or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See Williams v. Jones, 3 Hurl. & C. 256. The fact that the section foreman assisted in or even directed the act does not alter the case. In doing so he was as much his own master and doing his own business as were the section men. Had it appeared that it was part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of Chapman v. New York, etc. R. Co., 33 N. Y. 369, be considered the negligence of the defendant. But nothing of the kind appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability."

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—WHEN ACCRUES FOR BREACH OF WARRANTY.

The warranty that a note is as good as gold, or as good as money, is not in legal effect a warranty that it is collectible by due process of law, and it is not necessary to exhaust the legal remedies at law against the maker before suing the assignor of the same for a breach of warranty. *Taylor* v.

Soper, S. C. Mich. March 6, 1884; 18 N. W. Rep. 570.

2. ADMIRALTY—JURY TRIAL—REV. ST. § 566—VERDICT.
The verdict of a jury, in an admiralty cause arising upon the lakes, and tried by jury pursuant to Rev. St. § 566, is merely advisory, and may be disregarded by the court, if, in the opinion of the judge, it fails to do substantial justice. The practice of calling nautical assessors approved. *The Empire*, U. S. D. C., E. D. Mich., Feb. 18, 1884; 19 Fed. Rep. 558.

3. AGENCY—TERMINATION OF AGENCY—DEATH OF PRINCIPAL.
A broker in a stock transaction is not bound to close it after the death of the principal without awaiting the appointment of a representative, but is authorized, acting in good faith, to maintain the existing situation until a representative of the estate should be appointed. *Hess v. Rau*, N. Y. Ct. App. March, 1884; 25 N. Y. Reg. 645.

4. ATTORNEY AND CLIENT—CONTINGENT FEES—WITNESS.
A contract for a contingent fee is binding upon both attorney and client, although it was then understood that the former was to testify for the latter at the trial, provided that the fee was not at all intended as a reward for his services as a witness. *Perry v. Dicken*, S. C. Pa., Jan. 16, 1884; 14 W. N. C. 245.

5. CONSTITUTIONAL LAW—ELECTIONS—TRIAL BY JURY.
A law providing for the trial of contested elections of constables, corporate officers, etc., by judges, violates no constitutional right to trial by jury. *Allison v. State*, S. C. Ga., March 4, 1884; 17 Rep. 393.

6. CONSTITUTIONAL LAW—FIXING BAIL—A JUDICIAL ACT.
Fixing the amount of bail is a judicial act, and a statute vesting the power of fixing it in the clerk of court is unconstitutional. *Gregory v. Gudgel*, S. C. Ind., April 2, 1884.

7. CONSTITUTIONALITY OF STATUTE GIVING JURISDICTION TO FEDERAL COURTS—ACTS OF INDEMNITY.
Congress may lawfully give the courts of the United States exclusive or concurrent jurisdiction of all actions brought to enforce any liability incurred through obedience to the orders of governmental officers, where the defendant, if compelled to respond in damages, would be entitled to demand indemnity from the public treasury. *Mitchell v. Smith*, U. S. S. C., March 3, 1884; 4 S. C. Rep. 170.

8. CONTRACT—BROKER—COMMISSION—FRAUD.
Plaintiff was requested by third parties to recommend to them a builder "whom he could indorse as in every way responsible and reliable." He recommended the defendant, who orally promised to pay him for "his trouble." *Held*, that the promise was void as in fraud of the third parties who supposed that he was disinterested, and he could not recover thereon, although the defendant had completed the buildings and had received his pay therefor. *Holcomb v. Weaver*, S. J. C. Mass., Jan. 29, 1884; 17 Rep. 401.

9. CRIMINAL LAW—INDICTMENT FOR MAILING AN OBSCENE AND INDECENT PUBLICATION.
An illustrated pamphlet, purporting to be a work on the subject of the treatment of spermatorhœa and impotency, and consisting partially of extracts from standard books upon medicine and surgery, but of an indecent and obscene character, and intended for general circulation, *held* to come within the provisions of section 3893 of the the Revised Statutes. *United States v. Chesman*, U. S. C. C., E. D. Nev., March 30, 1884; 19 Fed. Rep., 497.

10. CRIMINAL PLEADING—INDICTMENT FOR THEFT—CONVICTION OF RECEIVING STOLEN PROPERTY WRONG.
Under an indictment for theft, the defendant can not be convicted of the offense of receiving stolen property. *Brown v. State*, Tex. Ct. App., Galveston Term, 1884.

11. DAMAGES RECOVERABLE FOR FAILURE TO DELIVER A TELEGRAM.
Where A. telegraphed B. if the latter desired a position to come by first train, and the company failed to deliver the telegram, *Held*, B could only recover to the amount of time lost in going to and returning from the place where the position was to be had, and reasonable expenses of such trip. *W. U. Tel. Co. v. Connelly*, Tex. Ct. App., March 5, 1884, 16 Chic. L. N., 232.

12. DEED—OF TESTAMENTARY CHARACTER—DELIVERY—SUFFICIENCY.
A., having executed in due form a deed of gift of real estate to his son, said to B.: "Take this deed and keep it. If I get well I will call for it. If I don't, give it to Billy," the grantee. A. was then ill, and died within a few days thereafter of the same illness, and B. then handed the deed to the grantee, who caused it be recorded. *Held*, that this did not constitute a delivery, and the instrument was invalid as a deed. *Williams v. Schatz*, S. C. Ohio, March 4, 1884, 5 Ohio L. J. 288.

13. EMINENT DOMAIN—ELEMENTS OF DAMAGES.
Distinct injuries sustained after a railroad is fully completed and operated can not be assessed as part of the damages in an action to recover for the value of the land appropriated by the railroad company. *Gilmore v. Pittsburgh, etc. R. Co.*, S. C. Pa., Jan. 7, 1884; 14 Pitts. L. J., 334.

14. EQUITY PLEADING AND PRACTICE—MULTIFARIOUSNESS—BILL TO SETTLE LEGAL TITLE—PARTITION.
1. A bill in equity which prays a decree to determine and settle a disputed legal title to real estate, and also that the court make partition of the realty according to the interests of the parties when so determined, is multifarious. 2. In such case, the proper course for the court is to treat the bill for partition alone, and to retain it until the title is settled in another suit or in an action at law. *Chapin v. Sears*, U. S. C. C., D. N. J., 7 N. J. L. J., 111.

15. ESTOPPEL—FRAUD—RECITAL—SECOND MORTGAGEE.
A mortgage given in fraud of creditors, is valid as against a creditor who took a second mortgage subject thereto, if he had actual notice thereof, and the recital thereof in the mortgage is sufficient evidence of that fact. *Tolbert v. Horton*, S. C. Minn., March 17, 1884, 18 N. W. Rep., 647.

16. EVIDENCE—SEDUCTION—DEFENDANT'S WEALTH—DAMAGES.
In an action for breach of promise of marriage the wealth of the defendant may be taken into account; but in seduction the object is the compensation of

the wrong to the plaintiff; and as the defendant may not show his poverty in mitigation of damages, his wealth should not be shown, and liberty given the jury to punish the defendant besides compensating the plaintiff. *Watson v. Watson*, S. C. Mich. March 6, 1884; 18 N. W. Rep. 605.

17. GARNISHMENT—EXECUTORS AND ADMINISTRATORS—ATTACHMENT—DISTRIBUTION.
Funds in the hands of an executor or administrator can not be attached; they must be distributed according to law. *Norton v. Haydon*, S. C. Nev. Feb. 12, 1884; 17 Rep. 407.

18. GUARANTY — CONTINUING GUARANTY — CONSTRUCTION.
A guaranty in these words: "Please deliver to A. goods as he may want from time to time, not exceeding in amount three hundred dollars, and if not paid for by him within thirty days I will be responsible for the same," is not a continuing guaranty, but is exhausted when goods have been purchased by A. to the amount of the guaranty. *Cutler v. Ballou*, S. J. C. Mass. Jan. 8, 1884; 17 Rep. 400.

19. INFANCY—DISAFFIRMANCE OF CONVEYANCE—NECESSITY OF ENTRY.
A minor upon attaining his majority, to disaffirm his conveyance need not make a re-entry; a new deed entitles the grantee therein to maintain ejectment against the former grantee. *Haynes v. Bennett*, S. C. Mich. March 6, 1884; 18 N. W. Rep. 539.

20. INSURANCE—FIRE—WAIVER OF BREACH.
A fire insurance company waives the condition of the policy (viz.) that chimneys of stone or brick should be the only escape of the smoke from fires by not canceling it after notice of its breach and receiving the assessment on plaintiff's stock on account of it. *Osterlop v. N. D. Mut. F. Ins. Co.*, S. C. Wis. March 18, 1884; 6 Wis. L. N. No. 160.

21. JUDICIAL SALES—DEED OF TRUSTEE BEFORE CONFIRMATION—VALIDITY.
A trustee appointed by the court to sell real estate executed a deed of conveyance thereof before the sale was confirmed by the court. *Held*, the deed was a nullity, and not a mere irregularity. *Johnson v. Blackiston*, Md. Ct App. Feb. 1884; 17 Rep. 399.

22. LANDLORD AND TENANT—HOLDING OVER—TENANCY FROM YEAR TO YEAR.
Where a specified annual rent is stipulated for in the original lease, no matter at what periods the installments are to be paid, and the tenant holds over by agreement of both parties, the law implies a tacit renovation of the contract, and a tenancy from year to year, to terminate which a six months' notice is necessary, the notice to be six months before, and ending with, the current year. *Brown v. Knox*, S. C. Wis. Feb. 19, 1884; 18 N. W. Rep. 322.

23. LUNACY—INSOLVENT ESTATE—MAINTENANCE—RIGHTS OF CREDITORS.
Where a lunatic is insolvent, the court will provide what is necessary for his maintenance and comfort before considering the claims of creditors, though it will have regard to them. *In re Piratt*, Eng. Ct. App. 49 L. T. N. S. 418.

24. MARRIAGE SETTLEMENTS—COVENANT—DWELLING HOUSE.
Where an ante-nuptial agreement stipulated that the wife should have a "dwelling house" in lieu of her dower, etc., she is entitled under the covenant to receive from her husband's estate a dwelling house such as would have been suitable to a person of his circumstances and condition in life, and that there being no such house comprised in her husband's estate she is entitled to receive the value of such a house in money by way of compensation. *Busy v. McCurley*; *McCurley v. McCurley*, Md. Ct. App.; 12 Md. L. Rec. 36.

25. MORTGAGE—POWER OF SALE—FORECLOSURE—PROCEEDINGS—EQUITABLE ASSIGNMENT.
A second mortgagee, under a power of sale mortgage, must sell only the mortgagor's right to redeem from the first mortgage. A sale of the land subject to the first mortgage is void; but it will operate as an assignment of the second mortgage to the purchaser. *Butts v. Andrews*, S. J. C. Mass. 7 Mass. L. Rep. March 27, 1884.

26. NEGLIGENCE—ACTION FOR WRONGFUL DEATH—CONTRIBUTORY NEGLIGENCE.
Where, in a libel for damages for the killing of a husband and father, the ferry steamer inflicting the injury was in fault, but the deceased had violated rules of the managers, forbidding passengers to step over guard-chains and passing off to the wharf before the boat was drawn up and made fast at the landing, in doing which deceased received fatal injuries, but in doing so only did what men and boys habitually and constantly did on the ferry, without restraint or remonstrance from the management, *held*, that this was not such contributory negligence on the part of deceased as to exonerate the claimants from responsibility in damages, the managers of the ferry having, by neglecting to enforce their rules, held out to passengers that there was no practical danger in violating them, and thereby put the deceased off his guard as to the danger attending the practic which was habitually permitted. *The Manhasset U. S. D. C. E. D. Va.*, Feb. 24, 1884; 19 Fed. Rep. 430.

27. NEGOTIABLE PAPER—ALTERNATIVE CONDITIONS—FORFEITURE.
Where the larger sum mentioned in a note is the actual debt, and a smaller sum has been agreed upon as a release, if paid under stated conditions the failure to comply with the easier terms gives the creditor the absolute right to enforce the payment of the larger sum, and equity can give no relief. *Waggoner v. Cox*, *S. C. Ohio Com.*, March 4, 1884; 5 Ohio L. J. 285.

28. NUISANCE—LEGISLATIVE AUTHORITY NO DEFENCE.
It is no defence to a bill for an injunction to restrain a nuisance that the legislature authorized the purchase of the land for the purposes of the defendant's business and that there was no negligence to be imputed to the defendant in conducting that business. *Eng. H. Ct. Ch. Div.*, 50 L. T. N. S. 89.

29. PATENT LAW—WANT OF NOVELTY—TRUCKS FOR LOCOMOTIVES.
In trucks already in use on railroad cars, the king bolt which held the car to each truck passed through a bolster supporting the weight of the cars, and through an elongated opening in the plate below, so as to allow the swiveling of the truck upon the bolt, and lateral motion in the truck; and the bolster was suspended by divergent pendent links from brackets on the frame, whereby the weight of the car tended to counteract any tendency to depart from the line of the

track. *Held*, that a patent for employing such a truck as the forward truck of a locomotive engine with fixed driving wheels was void for want of novelty. *Pennsylvania R. Co. v. Loco. Eng. etc. Co.*, U. S. S. C. March 3, 1884; 4 S. C. Rep. 220.

30. SALE—ADMINISTRATOR'S—FALSE REPRESENTATIONS—DEFENCE.
It is no defence to an action on notes given for the price of land sold at an administrator's sale that the purchase was procured by the false representations of the administrator. He is individually liable only. *Riley v. Kepler*, S. C. Ind. March 27, 1884.

31. STATUTE OF LIMITATIONS—DISABILITIES MUST EXIST WHEN CAUSE OF ACTION ACCRUES.
No disability arising after the statute of limitations has once begun to run will suspend its operation. A party appealing from a decree of a district or circuit court, after the lapse of two years, is not helped by the fact that he has been imprisoned during the entire period, except a few months directly following the decree. *McDonald v. Hovey*, U. S. S. C., March 3, 1884; 4 S. C. Rep., 142.

32. SURETYSHIP—BAIL-BOND—NO RIGHT OF ACTION BY BAIL AGAINST DEFAULTING PRISONER—BONDS TO UNITED STATES—SUBROGATION.
1. When a prisoner released on bail forfeits his recognizance, his sureties can not recover against him or his estate the amount they are compelled to pay by reason of his default. 2. Section 3468 of the Revised Statutes, which declares that sureties on bonds given to the United States shall, upon default of the principal obligor, be remitted to the rights of the United States against him, has no application to bail-bonds in criminal cases. *United States v. Ryder*, U. S. S. C., March 10, 1884; 4 S. C. Rep., 196.

34. WAGER—LIABILITY OF STAKEHOLDER—HIS RIGHT TO PAY WINNER.
Money being bet on the result of a congressional election, and deposited with a stakeholder, a payment by him to the supposed winner, after the result of the election is generally known, or "publicly announced," but before the issue of an official certificate by the Secretary of State, is premature, and is no defense to an action by the loser, who, before the issue of the certificate, notified him not to pay. *Lewis v. Burton*, S. C. Ala., March, 1884.

34. WILL—CONSTRUCTION—DEVISE TO CLASS.
A devise to one until he becomes bankrupt, and upon his bankruptcy, over to his children, embraces children born after the bankruptcy as before. *Bedson's Trusts*, Eng. H. Ct. Ch. Div. 58 L. T. (N. S.) 120.

35. WILL—CONSTRUCTION—RIGHTS OF CHILDREN DEVISEE IN LAPSING LEGACY.
Property was left by will to the four children of the testatrix, none of whom were married at date of the will, with the proviso "that if any of my children die before me, my estate shall be divided among the survivors or their legal representative, share and share alike." One daughter married, and died before her mother, leaving two children. *Held*, that they took under the will the share that their mother would have taken had she survived the testatrix. *Rivenett v. Bourguin*, S. C. Mich. March 6, 1884; 18 N. W. Rep. 537.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

34. One Jones, party of the first part conveyed to "A. B. husband of C. D. and the heirs of A. B. & C. D. parties of the second part" real estate to have and to hold unto "the said parties of the second part and their heirs." At the time of the conveyance A. B. & C. D. had two children living. What estate, if any, did the two children acquire by said conveyance?
Denver, Colo. B.

QUERIES ANSWERED.

Query 22. [18 Cent. L. J. 220.] Does the fraudulent alteration of a mortgage note destroy the validity of the mortgage?
LEX.

Answer. This question was decided in the negative by the Supreme Court of South Carolina in Phyler v. Elliot 19 S. C. 257. In that case the court held, that no recovery could be had on the note, it having been fraudulently altered; no recovery could be had on the debt, which the note evidenced, because the note absorbed the simple obligation for money due; but that the piff. was entitled to judgment for foreclosure of the mortgage (on real estate), because the mortgage was an independent and distinct security for and evidence of the debt. A queer conclusion, yet still a judicial finding.
Chester, S. C. G.

Query 27. [18 Cent. L. J. 237.] "On or before the 25th. of Dec. after date I promise to pay John Doe or order" etc. 1st. When does this note become due? 2nd. Is it negotiable? Cite authorities.
Kansas City, Mo. L.

Answer No. 1. The note becomes due on the 25th day of December. The words "on or before" does not render the time of its payment uncertain. It is payable certainly, and at all events on a day particularly named, and payment can not be enforced before that time against the maker. The maker may pay sooner if he shall choose, but that would only be a payment in advance of any legal liability to pay, and nothing more. Presuming that the note has no other non-negotiable quality, than the supposed uncertainty of time of payment, it is also negotiable. There is no reason why its negotiability should be questioned, as it is not a note which makes the payment subject to any contingency, or puts it upon any condition. The above is in substance the language of Cooley, J., in the case of Mattison v. Marks, 31 Mich. 421; 18 Am. Reports, 197, which was a case precisely in point. In Byles on Bills, (*92) page 189 (5th American Ed.) the author says: "But it is not material that the time when the event may happen is uncertain, provided it must happen at some time or other; thus, a note payable on the death of A. B. is good," for the reason of course that A. B. must die. The same doctrine is laid down in Edwards on Bills and Promissory notes, star paging 154, 2nd. Ed. The author says; "And they (notes) are sometimes made payable on the happening of an event which is certain, but un

certain as to the precise time when it will take place; as where they are made payable on the death of a person named. It is required only that the time be such as may be ascertained and fixed, and that it be not in the power of the promisor to delay the time of payment or prevent the maturing of the note," In Daniel on Negotiable Instruments, Vol. 1, sec. 5 page 49, the author uses this language after discussing the question and citing the various decisions. "But if a certain or reasonable definite time be fixed when the liability to pay occurs, thus making the limit of the currency of the note and the period of its maturity, the fact that it may be taken up in advance ought not to impair its character as a negotiable note, and we have already given what seems to us the better opinion, as expressed by Judge Cooley, in reference to instruments so payable." 31 Mich. 431, *supra*. The case of Stillwell v. Craig, 58 Mo. 24, discusses the question of certainty of time of payment and sustains the principles heretofore stated. In the case of Ernst v. Steckmen 74 Pa. St. 13 the following was held to be a negotiable note: "Twelve months after date (or before if made out of the sale of a machine) I promise to pay to J. H. Huston or bearer &c." And the court further says in the same case "A note may be negotiable if payable at a fixed time, although subject to a contingency under which it may become due earlier." In Jordan v. Tate, 19 Ohio St. 586 it was held that "The negotiable character of a promissory note is not affected by the fact that it is made payable 'on or before' a future day therein named. It may be regarded as payable solely on the day named." Numerous other cases could be cited in which the form of note suggested by "L." in his query, has been held negotiable and that the date therein specified would be the time when the note would become due, notwithstanding the words, "On or before" were inserted, but we think the above sufficient.

Hamilton, Mo. B. M. DILLEY.

Answer No. 2. 1st. The note became due December 25. A promise to pay on or before a day mentioned, states the time of payment with sufficient certainty. 14 Am. Dec. 434, and cases there cited. 2nd. Yes, the time of payment being certain, the note is negotiable. "Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings." Per Justice Cooley, in Mattison v. Marks, 31 Mich. 421, 423. See also 19 Ohio St. 586. E. V.

Eureka, Nev.

Answer No. 3. Becomes due December 25 next after date. In the case of Curtis v. Horn, 58 N. H. 504, reported in 26 Alb. L. J. 12, the court said: "It is now the common law that where the payment is made to depend upon an event that is certain to come, and uncertain only in regard to the time when it will take place, the note or bill is negotiable. Edwards on Bills and Notes, 142; Story on Prom. Notes, sec. 27; also Ernst v. Steckman, 74 Pa. St. 13; S. C., 15 Am. Rep. 542; Walker v. Woollen, 54 Ind. 164; S. C., 23 Am. Rep. 639; Mattison v. Marks, 31 Mich. 421; S. C., 18 Am. Rep. 197. Also Jordan v. Tate, 19 Ohio St. 586. E. C. DAY.

Incinnati, Ohio.

Answer No. 4. 1st. Note becomes due (with race) December 28th. 2nd. It is negotiable, as it contains an absolute promise to pay at a certain future date, and the negotiability is not affected by the provision inserted. See Mattison v. Marks, 31 Mich. 421; Jordan v. Tate, 19 Ohio St. 586; Cotha v. Buck, 7 Metc 588; Ernst v. Steckman, 74 Pa. St. 13; Walker v. Woollen, 54 Ind. 164. Contrary doctrine seems to prevail in Massachusetts and Missouri. See cases cited in note to Miller v. Poage, 41 Am. Rep. 82. Also Mahoney v. Fitzpatrick, 133 Mass. 151.

FRANK H. LUMBARD.

Ortonville, Minn.

Query 28. [18 Cent. L. J. 237.] A leased to B a store for a term of one year at a monthly rent of $25 the rent to be paid monthly on the last day of each and every month, and in case the rent was not paid promptly as specified, A should have the privilege of taking possession of said premises and declaring the lease ended, and B further agreed that if he did not pay the rent as therein specified, he would pay the sum of one hundred dollars as damages. B failed to pay the second months rent. A declares the contract broken by B and brings suit to recover one months rent and one hundred dollars as liquidated damages, can he recover? Please cite authorities.

Ellensburg, Wash. Terr. LEX.

Answer. No, he can not recover. Courts usually consider the terms of the contract and the intention of the parties; and when the language is clear and explicit that the amount is to be considered liquidated damages, and is not inconsistent with the instrument's subject-matter, or the intention of the parties, the courts will so hold. Dennis v. Cummins, 3 Johns. Cas. 297; 1 Am. Dec. 331, and cases there cited; Liquidated Damages and Penalties," 18 Cent. L. J. 143. E. D. V.

Eureka, Nev.

RECENT LEGAL LITERATURE.

HIGH ON EXTRAORDINARY LEGAL REMEDIES. A Treatise on Extraordinary Legal Remedies Embracing Mandamus, *Quo Warranto*, and Prohibition. By James L. High. Second Edition. Chicago, 1884: Callaghan & Co.

The first edition of this work, which was issued ten years ago, was reviewed in Vol. 2 Cent. L. J. 34. According to the author, nearly eight hundred decisions have since appeared upon the topics of which the book treats. A new edition upon a subject of this importance is none too premature when there has been so large an addition to the stock of materials wherefrom the book was originally prepared. This is by all means the most thorough and practical work for the American practitioner. Mr. High has acquired an enviable reputation as a writer; and no one is a better authority upon the subject of Remedies of every character than he is, as seen in his works. He has a plain, forcible style; indulges in very little philosophizing but aims to inform the reader as to what the Courts have done. His arrangement is always entirely unobjectionable, and his indexes are perfect. He is one of the comparatively young authors, who has made a success both as a practitioner and author. He has added sixty-one pages to the text, the original paging being retained and indicated by stars. We are glad this feature was not overlooked. There is one thing about the book

which is common to a great many, and its elimination would be of great service to the practitioner. In the index the references are to the sections; and the searcher must "fumble" around for the section, whereas it would be so much more convenient if the references were to the pages, or if the pages were numbered according to the sections. The former would to us be preferable, by far. We admit it is less difficult for the author to make the index in the manner we point out; but that element should not be regarded by one who seeks to lighten the labors of those whose patronage is sought. As we have said before, the work of Messrs. Callaghan has been before the public too long to expect anything second-class from their quarter.

THE FEDERAL REPORTER.—Cases Argued and Determined in the Circuit and District Courts of the United States, August, October 1883; Vol. 17 & 18, Robert Desty, Editor; St. Paul, 1883, West Publishing Co.

The only notable cases in the seventeenth volume are the Virginia Repudiation cases, Baltimore & Ohio R. R. Co. v. Allen et al; the "Elevator case" decided by Judge Miller, to the effect that the breach of a condition of a lease will be considered waived by the lessor if he fails to object for a considerable period of time; the great Gaines case in Louisiana; Matthews v. Murchison from North Carolina, in which the power of married women to estop themselves is discussed; and Bryant v. Western Union Tel. Co. the "Bucket shop ticker case" in which it was held that a "bucket shop" could not require a telegraph company to furnish accommodations to it. The "index to the notes" was evidently prepared by some one not well up in legal bibliography. We observe that the learned author of the treatise on Mortgages is identified several times as "Leonard H. Jones. The editor's and publisher's work is well done; and there are many valuable annotations by able authors.

The notable cases in the eighteenth volume are *in re* Brosnahan Jr. U. S. C, C. W. D. Mo. with a learned note by Hon. S. D. Thompson; Hughes v. Northern Pac. Ry. Co. U. S. C. C. D. Oreg. The Head money cases, U. S. C. C. E. D. N. Y., with note by Robert Desty; Kaeiser v. Illinois Central R. Co. U. S. C. C. S. C. Iowa; *ex parte* Ker U. S. C. C. N. D. Ill; Trussell v. Scarlett, U. S. C. C. D. Md., with note by Francis Wharton, LL.D.; Hartman v. Fishbeck, U. S. C. C., E. D. Wis., with note by William Talcott; Tompkins v. Little Rock & Ft. S. Ry; Paxton v. Marshall, U. S. C. C., W. D. Ill., with note by Adelbert Hamilton; the great railroad tax cases in the Circuit Court of California, decided by Mr. Justice Field, with note by the editor; Austin v. Seligman, U. S. C. C., S. D. N. Y., with note by Francis Wharton, LL.D.; the great Debris case, U. S. C. C., D. Cal.: the Frank James case, U. S. C. C., W. D. Mo.

CORRESPONDENCE.

Editor Central Law Journal:

That which remains of what was once designated the fundamental law of Kansas, is its Constitution, provides that "no justice of the Supreme Court or judge of the district court shall be eligible to any other office of trust or profit, either Federal or State, during the period for which said justice or judge shall have been elected." Despite this constitutional provision, the people of Kansas degrade a judge from his supposed high position to that of a mediocre Congressman about every election. Congress, in passing on this question and seating the judge, does so on the theory that it is the exclusive judge of the election and qualification of its members. As a matter of law I guess this is correct, yet a matter to be regretted because it tends to break down the barrier intended to be interposed against judges. In the case of Watson v. Cobb, 2nd Kansas, decided in A. D. 1863, the Supreme Court of Kansas say, that the fact that the court is powerless to follow the judge into the new sphere to which he hath been translated, does not in any manner change the law. A new feature is now given in Kansas to this judicial hegira. A judge is abdicating to go on the Federal Circuit bench, in violation of the above constitutional provision. So far as his judicial acts in other States are concerned, his acts may be valid, but what of his acts in Kansas? Are they valid, voidable, or void? We are informed that the State Constitution can not define who shall be a Federal officer, yet the Federal courts follow the decisions of the State court as a rule. Suppose this new Federal circuit judge forcloses a mortgage on Kansas land, and the Supreme Court of Kansas is asked to enjoin the sale because the judgment is void by reason of the judge's disabilities, what would the Supreme Court of the United States do in all human probability, think you? Think you that this most august judicial tribunal of the civilized world would slap the Kansas Supreme Court in the face—give its youthful, yet emasculated, fundamental law another kick—and sustain the Federal circuit judge in his violation of the constitution, or would it give the State constitution its sanction, and give the judge a kick, and enjoin the sale? It seems to me that the Federal Supreme Court would sustain the State constitution as an act of judicial common decency, if on no other ground.

KANSAS.

NOTES.

——The New York City Court has recently in Sondheim v. White held that a seat in the New York Stock Exchange is valuable property, subject to the payment of debts. See 25 N. Y. Reg., 391.

——It is wholly out of place for a judge to express his personal feelings while on the bench, especially when due to race prejudice. Justice Butt, of England, while on his circuit in the north of England, in his charge to the grand jury, referred to the number of Irish names in the calender, and opposite which appear charges of atrocious crimes of violence, and he said this confirmed an opinion formed in the House of Commons and elsewhere, that the Irish are not a law-abiding race or peace loving nation. The *Law Times* says there has been an outburst of indignation. We do not wonder at this in the least; such remarks are wholly gratuitous, and shows in the judge an utter lack of sense of propriety.